

STATE OF NEW YORK: DEPARTMENT OF LABOR
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In the Matter of

CONTINENTAL CONSTRUCTION, LLC, and
DAVE J. FAIRBANKS, as an officer and/or
shareholder of CONTINENTAL
CONSTRUCTION, LLC;

Prime Contractor,

and

BMMB CONSTRUCTION LLC, and ELBERT
MURPHY, an as officer and/or shareholder of
BMMB CONSTRUCTION LLC;

Subcontractor

for a determination pursuant to Article 8 of the
Labor Law as to whether prevailing wages and
supplements were paid to or provided for the
laborers, workers and mechanics employed on a
public work project for the Watertown Business
Center Addition at Watertown International
Airport in Dexter, New York.

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**DEFAULT
REPORT
&
RECOMMENDATION**

Prevailing Wage Rate
No. 2013007110
Case ID: PW06 2015004689
Jefferson County

To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on August 1, 2017, a hearing was held on
September 19, 2017 in Albany, New York and by videoconference with Syracuse, New
York. The purpose of the hearing was to provide all parties an opportunity to be heard on
the issues raised in the Notice of Hearing and to establish a record from which the
Hearing Officer could prepare this Report and Recommendation for the Commissioner of
Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether BMMB Construction LLC ("Sub") a subcontractor of Continental Construction LLC ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving construction of the Watertown Business Center Addition at Watertown International Airport in Dexter, New York ("Project") for the County of Jefferson ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Frank Chou, Attorney, of counsel).

There was no appearance made by, or on behalf of, Sub. The Department attempted to serve the Notice of Hearing on Sub via regular and Certified mail; although the Certified mailings were returned, the regular mail was not returned. In addition, the Department served the Secretary of State as an agent for service of process on Sub. (HO 5) Sub failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Sub is in default.

Prime paid the amount of the underpayment the Bureau determined Sub owed with interest in advance of the hearing, which payment the Bureau deemed sufficient to resolve Prime's Article 8 liability. In addition, Prime provided an affidavit, submitted by Department Counsel, which established that Prime met the standard for waiver of any civil penalty assessed against Sub. (DOL 17, 18)

FINDINGS AND CONCLUSIONS

The Notice of Hearing alleges that Sub underpaid wages and supplements to its workers and that Prime is responsible for Sub's underpayment pursuant to Labor Law § 223.

Prior to the hearing, Prime stipulated, *inter alia*, to pay the underpayment of Sub in full satisfaction of Prime's liability under Labor Law article 8. Pursuant to the stipulation, Prime submitted to the Department a check in the amount of \$2,553.30,

consisting of \$1,983.63 in wages and supplements and \$569.67 in interest, calculated at 10%. (DOL 17)

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, which supported the Bureau's charges that:

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

Sub entered into a contract with Prime for work on the Project; and

Sub willfully underpaid \$1,983.63 to its workers for the audit period weeks ending October 31, 2014 through November 7, 2014; and

Sub was uncooperative with the Department during the course of the investigation; and

Sub did not have a prior history of violations with the Department before the investigation; and

Sub underpaid one worker on the Project; and

Sub's underpayment was for less than \$2,000.00 in wages and supplements out of a subcontract valued at \$30,600.00; and

Sub's certified payroll records credited the Claimant with fewer hours than he claimed to work for the week ending 10/31/14 and with more hours than he claimed to work for the week ending 11/7/14.

Elbert Murphy is an officer of Sub; and

Elbert Murphy knowingly participated in the violation of Labor Law article 8.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the default of Sub in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Sub underpaid its worker \$1,983.61 on Prevailing Wage Rate Case No. 2013007110; and

DETERMINE that Sub is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Sub to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that Elbert Murphy is an officer of Sub; and

DETERMINE that Elbert Murphy knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub's payroll records were not falsified as that term is used in Labor Law article 8; and

DETERMINE that, based upon the factors set forth in the hearing, Sub be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

DETERMINE that Prime stipulated to pay, and did pay, in complete satisfaction of its liability under Labor Law article 8, the assessed underpayment of \$1,983.61 and 10% interest of \$569.67 for a total of \$2,553.30; and

DETERMINE that, pursuant to 12 NYCRR § 221.1, Prime shall not be subject to any civil penalty assessed against Sub; and

ORDER that the Bureau compute the total amount due (underpayment of \$1,983.61, interest at 16% from date of underpayment and 10% civil penalty); and

ORDER that Sub shall receive a credit for the \$2,553.30 paid by Prime; and

ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount remaining due, made payable to the Commissioner of Labor, to the Bureau at: State Office Building, 333 East Washington Street, Room 419, Syracuse, NY 13202; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: September 19, 2017
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerome Tracy", with a long horizontal flourish extending to the right.

Jerome Tracy, Hearing Officer